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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 02 055 52714

Office: CALIFORNIA SERVICE CENTER

Date: JAN 31 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

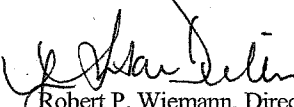
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in February of 2000. It is engaged in the development, programming, manufacture, and installation of industrial machine tool, controllers, and control software along with research of the United States marketplace for industrial machine products. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the position of president of the petitioner is an executive and managerial position.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification

is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially described the beneficiary's job duties as follows:

In the executive position of President, [the beneficiary] is the highest ranking officer of the company and is responsible for the overall management and administrative functions of the company, including the establishment and maintenance of the company's policies and procedures, financial management such as approval of the annual budget of the company, evaluation of short-term and long-term financial and capital needs, preparation of tax returns and other financial matters, engineering management and personnel management. In addition, [the beneficiary] is responsible for developing various business plans and effectuating such business plans as have been approved by the Board of Directors.

As President, [the beneficiary] has the authority to sign all official and legal documents on behalf of the company, to hire and fire employees; to engage in other personnel matters such as recommending the hiring, promotion and firing of employees; and to make discretionary decisions regarding the day-to-day operations of the company. All officers and managers of the corporation will report to the President, who will report directly to the Board of Directors as well as to the sole shareholder.

In response to the director's request for additional evidence to establish that the beneficiary would be performing executive or managerial duties for the United States petitioner, the petitioner provided the same description of the beneficiary's duties as above.

The petitioner also submitted brief job descriptions for its seven other employees as well as its organizational chart. The organizational chart depicted the beneficiary as president overseeing two departments, a research and development department and a department for general administration. The research and development department consisted of five positions, a general manager, a manager, a senior engineer, an engineer, and an assistant engineer. The department of general administration

consisted of two positions, a manager and an administrative assistant.

The job description for the general manager provided that this individual was responsible for managing the development of hardware and software for motion controllers as well as software for CNC machine interface for the petitioner's parent company's industrial equipment. The description also provided that this individual was responsible for providing technical and programming assistance and services as well as training to customers.

The job description for the engineer manager, identified on the organizational chart as a manager, provided that this individual was responsible for developing software for motion controllers as well as software for CNC machine interface for the petitioner's parent company's industrial equipment as well as assisting other engineers in handling similar duties. The description also provided that this individual was responsible for providing technical and programming assistance and services to customers and supervision of one other engineer.

The job description for the senior engineer provided that this individual was responsible for hardware development of motion controllers for electrical discharge machines. The description also provided that this individual was responsible for training new employees to assist in the development of hardware as well as supervising one engineer and making decisions regarding the development of motion controllers.

The job description for the engineer provided that this individual was responsible for developing software for motion controllers as well as software for CNC machine interface for the petitioner's parent company's industrial equipment as well as assisting other engineers in handling similar duties. The description also provided that this individual was responsible for providing technical and programming assistance and services to customers as well as performance analysis of the software.

The job description for the assistant engineer provided that this individual provided support to other engineers in the development of the CNC system software including the design and performance of tests on the hardware and software.

The job description for the general administration manager provided that this individual was responsible for overseeing the day-to-day operations of the department including personnel matters, accounting and financial matters, insurance matters, banking, and administration of the service providers to the company. The administrative assistant's duties included office management, accounting, human resources, and receptionist duties.

The director determined that the petitioner had not established that it required an executive based on the petitioner's job

description and a review of the petitioner's organizational chart. The director also determined that the petitioner had not established that the beneficiary was a manager because it appeared that the beneficiary was performing routine operational activities for the petitioner rather than managing those activities.

On appeal, counsel asserts that the beneficiary has significant authority over the generalized policy of the organization as prescribed by its by-laws and as shown by its organizational hierarchy. Counsel also asserts that the beneficiary is responsible for the overall operations of the petitioner on a day-to-day basis qualifying the beneficiary as an executive or manager. Counsel further asserts that if the beneficiary is not qualified as an executive he meets the criteria set out for a manager. Counsel provides a more detailed description of the beneficiary's duties and asserts that this additional description depicts an individual that is primarily engaged in management duties. Counsel also submits an exhibit that lists specific reports reviewed by the beneficiary and invoices for services reviewed and approved by the beneficiary. Counsel finally asserts that the general administrative manager carries out the day-to-day duties of administration and that the general manager handles the research and development functions and that these individuals are professionals who also supervise other employees.

It is noted that the petitioner and counsel appear to claim that the beneficiary qualifies under section 101(a)(44)(A) of the Act as a manager and under section 101(a)(44)(B) of the Act as an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). As noted by the director the initial job description for the beneficiary's position was not comprehensive in nature and in addition, paraphrased elements of the statutory definitions of executive and managerial capacity. See section 101(a)(44)(B)(i) and (ii). The description provided does not convey a clear understanding of the beneficiary's day-to-day duties for the petitioner. Moreover, it is not possible to determine from the initial description whether the beneficiary will be performing managerial or executive duties with respect to the tasks described or whether the beneficiary will be actually performing the tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604

(Comm. 1988).

It is not clear that the director considered the petitioner's descriptions of the beneficiary's subordinate staff when concluding that the petitioner could not reasonably support the beneficiary's position and the number of managers depicted on the petitioner's organizational chart. The duties described for the research and development positions indicate that the beneficiary's subordinate employees were primarily responsible for the development of hardware and software for motion controllers and for CNC machine interface for the petitioner's parent company's industrial equipment and for providing technical and programming assistance and services as well as training to customers. The position descriptions provided are indicative of individuals performing tasks requiring specific knowledge of the parent company's product rather than positions that necessarily are professional in nature. The position descriptions also provide a different hierarchical structure than provided in the organizational chart and provided by the description of the beneficiary's duties. For example, the initial description of the beneficiary's duties indicates that all managers report to the beneficiary. However, the organizational structure has the manager (also identified as the engineer manager) reporting to the general manager. The position description for the assistant engineer indicates this individual reports to the engineer manager and not to the senior engineer. Although these discrepancies are slight, when the petitioner is a small organization and is relying on several tiers of a management structure to demonstrate that the beneficiary is not a first-line supervisor, the discrepancies become more significant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The Service cannot conclude from the position descriptions for the beneficiary's subordinate employees that the positions primarily encompass professional, managerial or supervisory duties.

The petitioner has not provided further evidence on appeal that the positions require professional, managerial or supervisory personnel rather than individuals with specific knowledge of the parent company's product. Counsel's assertions to the contrary are not persuasive. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). The record is deficient in demonstrating that the positions subordinate to the beneficiary are professional, managerial or supervisory in nature or that the beneficiary's duties relating to the individuals holding these positions are more than those of a first-line supervisor. The petitioner has not provided sufficient evidence that the beneficiary will supervise or control the work of other supervisory, professional or managerial employees or will

manage an essential function of the petitioner.

The petitioner's additional description of the beneficiary's duties provided on appeal also does not demonstrate that the beneficiary is primarily performing managerial or executive duties. Although the description provides further clarification of the beneficiary's duties, it is still not clear that the beneficiary spends his time primarily performing managerial or executive duties rather than executing various operational tasks to enable the petitioner to continue to exist. For example, the initial letter of support indicated that the petitioner was engaged in market research in addition to developing hardware and software. The additional description of the beneficiary's duties provided on appeal states that the beneficiary will direct and coordinate research. Yet the position descriptions for the various employees do not include responsibility for market research. Although this is only one of the tasks performed by the beneficiary, the record does not differentiate between those tasks that are incidental to the beneficiary's duties and those tasks that require a majority of the beneficiary's time. It is not possible to determine from the position description of the beneficiary's duties and the purpose of the company that the beneficiary will be primarily engaged in managing or directing the management of the organization rather than primarily performing operational tasks. There is no clear delineation of the time the beneficiary will spend on executive and managerial duties and the time the beneficiary will spend as a first-line supervisor of non-professional, non-supervisory, and non-managerial positions.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.